Supreme Court, U. S.
FILED
FEB 6 1978
MICHAEL RODAK, JR., CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1155

UNITED STATES OF AMERICA

*v.*

DOMINGA SANTANA, *Petitioner*

## Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Gerald A. Stein
NEEDLEMAN, NEEDLEMAN, TABB & EISMAN, LTD.
*Attorneys for Petitioner*

600 One East Penn Square Bldg.
Philadelphia, Pa. 19107

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107 (215) 561-4050

## TABLE OF CONTENTS



## TABLE OF CITATIONS

*Federal Cases:*

*Federal Cases:* Page







*Federal Cases:* Page



*Federal Rules and Statutes:*

TABLE OF CITATIONS—*(Continued)*

*Federal Rules and Statutes:* Page



*Miscellaneous Reference:*





IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No.

UNITED STATES OF AMERICA

*v.*

DOMINGA SANTANA, *Petitioner*

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Dominga Santana, petitioner, by her attorneys, Gerald A. Stein, Esquire, and Needleman, Needleman, Tabb & Eisman, Ltd., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

## OPINION BELOW

The judgment order of the Third Circuit Court of Appeals (App. A, *infra*) is not reported.

## JURISDICTION

The Third Circuit Court of Appeals filed a judgment order on January 6, 1978 (App. A, *infra*). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

I. Whether the trial court erred in denying a defense motion for mistrial and overruling defense objections where a government witness testified to an alleged narcotics transaction of which he had no personal knowledge and with which the petitioner was not charged?

II. Whether the trial court erred in denying petitioner's motion for mistrial and overruling defense objections to testimony of a government witness, a police officer, which raised an inference that petitioner had been arrested on numerous prior occasions?

III. Whether the trial court erred in overruling a defense objection to the point for charge on the element of "intent to deliver", where the court's charge failed to instruct the jury that in weighing the evidence on petitioner's drug use, it could consider the police failure to examine the petitioner's body anywhere except her arms?

## CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.



## STATUTORY PROVISIONS INVOLVED

I. Section 841(A) of Title 21, U.S.C. provides as follows:

> §841. Prohibited acts A—Unlawful acts
>
> (a) Except as authorized by this sub-chapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
>
> (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

II. Rule 602 of the Federal Rules of Evidence provides as follows:

> Rule 602. Lack of Personal Knowledge
>
> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.
>
> Pub. L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1934.

III. Rule 703 of the Federal Rules of Evidence provides as follows:

> Rule 703. Bases of Opinion Testimony by Experts
>
> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or infer-

ences upon the subject, the facts or data need not be admissible in evidence.

Pub. L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1937.

## STATEMENT OF THE CASE

The petitioner, Dominga Santana, was arrested in her home on August 16, 1974, by officers of the Philadelphia Police Department and subsequently charged with Possession with Intent to Distribute a Controlled Substance in violation of Title 21 U.S.C. §841. Petitioner's motion to suppress physical evidence was granted by the United States District Court for the Eastern District of Pennsylvania on November 12, 1974. On March 21, 1975, the judgment of the district court suppressing physical evidence seized from petitioner, was affirmed by the United States Court of Appeals for the Third Circuit.

This Court granted the Government's petition for writ of certiorari, 423 U.S. 890, 46 L.Ed. 2d 121 (10/14/75), reversed the judgment of the United States Court of Appeals for the Third Circuit on June 24, 1976, *United States v. Santana,* — U.S. —, 96 S.Ct. 2406 (1976), and remanded the case to this Court for further proceedings in conformity with its opinion. The petitioner was tried by jury commencing April 26, 1977. On April 28, 1977, a verdict of guilty was returned on the charge of Possession with Intent to Distribute a Narcotic Controlled Substances in violation of 21 U.S.C. §841. Petitioner's Motion for a New Trial and/or Judgment of Acquittal was denied by the district court on June 13, 1977. Pursuant to Title 18 U.S.C. §4205(b)(2), petitioner was sentenced on June 20, 1977, by the Honorable Louis C. Bechtle, Judge of the United States District Court for the Eastern District of Pennsylvania to three years of special parole following completion of the term of custody. An appeal was taken to the United States Court of Appeals for the Third Circuit, which affirmed the judgment of the trial court in a judgment order dated January 6, 1978, at No. 77-1904.



The testimony of petitioner's trial reveals that the arrest of petitioner followed the completion of an undercover narcotics purchase arranged by Philadelphia Police Officer Michael Gilletti with Patricia McCafferty, allegedly serving as an unwitting intermediary (N.T. 2-16). Officer Gilletti testified that he and Sergeant Pruitt marked $110 in United States currency, money which was subsequently used to purchase heroin through McCafferty (N.T. 2-17 to 2-19). Gilletti gave the marked currency to McCafferty who left his automobile and returned shortly thereafter. McCafferty showed Gilletti a tin foil packet inside his automobile whereupon Gilletti arrested her (N.T. 2-19 to 2-21). Gilletti did not see McCafferty with petitioner Santana, hand money to or receive the tin foil packet from her (N.T. 2-34). Officer Gilletti testified that subsequent to the arrest, he informed Sergeant Pruitt that "Mom Santana had the $110" (N.T. 2-21 to 2-23), a reference to the $110 in marked currency used to purchase the narcotics from Mrs. McCafferty.

Testimony of government witness, Harold Pruitt, indicates that as a result of his conversation with Officer Gilletti, Officer Pruitt proceeded to 2311 North Fifth Street (N.T. 2-28). After observing petitioner Santana standing in the doorway at that location, Officer Pruitt, accompanied by Officers Strohm, Davis and Taggert, arrested her and seized packets of heroin from a bag which was dropped by her (N.T. 2-28 - 2-30). Officer Pruitt further testified that $70 of the currency marked by him and Officer Gilletti were recovered from Mrs. Santana's person (N.T. 2-30, 2-31).

The questions raised in the instant appeal relate to testimony to which timely objections were raised by defense counsel. One objection was made as a result of the statement by Officer Gilletti on direct examination that he informed Sergeant Pruitt that "Mom Santana has the $110" (N.T. 2-21 to 2-22). Objections to this statement by counsel for Santana on the grounds that the testimony was hearsay

and not based on the personal knowledge of the witness, were overruled by the Court (N.T. 2-22). Objection and motion for mistrial were also made by the defense counsel in response to testimony on redirect examination of government witness, Police Officer Richard Strohm. In response to questions posited by the Government, Officer Strohm testified that he had seen Mrs. Santana face-to-face on approximately seven occasions prior to her arrest on August 16, 1974 (N.T. 2-62). Finally, defense counsel objected to that portion of the court's charge which referred to the evidence relating to the charge of Possession with Intent to Deliver. The substance of the objection was that the charge failed to advise the jury that although Officer Strohm testified that he conducted an examination of petitioner's arms (N.T. 2-49 to 2-50), there was no evidence that he conducted an examination of the other parts of the body which are also commonly used for injection of narcotic substances (N.T. 3-2, 3-30).



## REASONS FOR GRANTING WRIT

### I. The District Court Erred in Denying a Defense Motion for Mistrial and Overruling Defense Objections Where a Government Witness Testified to an Alleged Narcotics Transaction of Which He Had No Personal Knowledge and with Which the Petitioner Was Not Charged.

In the direct examination of prosecution witness, Officer Michael Gilletti, he testified that he arranged a narcotics purchase from Patricia McCafferty and that he subsequently arrested her (N.T. 2-11). He testified that he gave Mrs. McCafferty $110 in marked currency and that Mrs. McCafferty went to a house, met a man on the doorstep, entered the house, returned to him and showed him a tin foil packet containing glassine bags (N.T. 2-16 to 2-22). Upon placing Mrs. McCafferty under arrest, she is alleged to have stated: "Mom Santana has the $110". Gilletti had no personal knowledge at that time of who had the money in question (N.T. 2-24 to 2-25). Officer Gilletti testified that after he had placed Patricia McCafferty under arrest for the sale of the narcotics, he informed Sergeant Harold Pruitt, one of petitioner's arresting officers that, "Mom Santana had the $110" (N.T. 2-21 to 2-22). Objections to this testimony by Gilletti, that "Mom Santana had the $110", and motion for mistrial were made by defense counsel on the ground that this indirect evidence of an alleged purchase by McCafferty of narcotics from Mrs. Santana was highly prejudicial as she was not charged with the sale or possession of the narcotics sold by McCafferty to Officer Gilletti (N.T. 2-12). The objection was also grounded on the fact that even if the statement that "Mom Santana had the $110" was true, there exists a reasonable inference that Mrs. Santana received the money from McCafferty by reason of an obligation unrelated to a narcotics relationship (N.T. 2-15). The court

recognized the validity of this inference (N.T. 2-14, 2-15) but overruled the objection with the understanding that all permissible inferences arising from the statement would be noted in the court's instructions to the jury (N.T. 2-15, 2-16). Finally, the statement that "Mom Santana had the $110", engendered an objection by defense counsel on the ground that the testimony was hearsay originating from information given by McCafferty subsequent to her arrest and that Officer Gilletti lacked first-hand knowledge of the information contained in the statement (N.T. 2-22). On cross-examination, Officer Gilletti admitted that the statement that "Mom Santana had the $110", was a repetition of an earlier assertion by McCafferty subsequent to her arrest (N.T. 2-24 to 2-25). The court overruled all defense objections to the statement and permitted its admission into evidence as evidence of the intent of Mrs. Santana with respect to the narcotics seized from her person at the moment of her arrest (N.T. 2-14).

The federal courts have established a "universal rule" that "evidence of the commission of an independent crime" is not admissible as a part of the case against a defendant. *United States v. Goodwin,* 492 F.2d 1141, 1148 (5th Cir. 1974); see 2 C. Wright, FEDERAL PRACTICE AND PROCEDURE, Criminal §410 at 123. The rationale behind the rule is that an accused's guilt or innocence, as to a particular crime, should be determined solely on the basis of evidence relating to that crime and that a jury should not be permitted to convict a defendant as the result of a belief that since a defendant committed another similar crime, he must also have committed the crime for which he is on trial. Nevertheless, federal courts have fashioned exceptions to this general rule admitting evidence of other crimes to prove some elements of the crime for which the defendant is being tried. *United States v. Goodwin, supra* at 1148, 1149. Thus, evidence of another crime similar in nature to the crime charged, may be received to establish intent or motive to commit the crime charged. *United States*



*v. Buckhanon,* 505 F.2d 1079 (8th Cir. 1974); *United States v. Goodwin,* 492 F.2d 1141 (5th Cir. 1974); *United States v. Lewis,* 423 F.2d 457 (8th Cir. 1970); *Robinson v. United States,* 366 F.2d 575 (10th Cir. 1966). *cert. denied,* 385 U.S. 1009, 87 S.Ct. 717, 17 L.Ed.2d 547 (1967). However, because of the prejudice inherent in the introduction of such evidence, evidence of the other crime must be *clear and convincing* in order for it to be admissible on the issue of intent. *United States v. Goodwin, supra* at 1150. Furthermore, courts engage in a balancing test; balancing "the actual need for that evidence in view of the contested issues and the other evidence available to the prosecution, and the strength of the evidence in proving the issue, against the danger that the jury will be inflamed by the evidence to decide that because the accused was the perpetrator of the other crimes, he probably committed the crime for which he is on trial as well." *Id.* at 1150.

Because of the great danger that other crime evidence will prejudice the rights of an accused to a fair trial, common sense dictates that hearsay evidence must not be admissible as evidence of a prior crime. Recognition of the danger of prejudice led the Court in *Goodwin* to require that evidence of other crimes must be *clear and convincing* in order to justify its admission into evidence on the issue of intent. Thus, a myriad of cases have held as inadmissible, hearsay evidence of narcotics involvement on the part of defendants. For example, in *United States v. McClain,* 531 F.2d 431 (5th Cir. 1976), the Court held that hearsay testimony that the defendant was a good outlet for cocaine was inadmissible to show predisposition to commit to offense (in response to an entrapment defense where evidence proving a defendant's predisposition to commit an offense is admissible). Likewise, where defendants in a prosecution for possession and distribution of marijuana raised a defense of entrapment, the United States Court of Appeals for the Sixth Circuit held in *United*

*States v. Cunningham*, 529 F.2d 884 (6th Cir. 1976) that cross-examination of defendants to establish their predisposition to commit the crime charged resulted in prejudicial error where the cross-examination was based upon reports founded upon hearsay information. The Court's objection to the evidence was grounded on the fact that the contents of the reports constituted merely the suspicions of law enforcement officials. The Court also noted that the incidents related in the reports did not lead to any arrest, indictment, or conviction. At 887.

In *Whiting v. United States*, 296 F.2d 512 (1st Cir. 1961), the evidence found to be inadmissible was testimony of a police officer that he received anonymous phone calls to the effect that defendant was involved in narcotics traffic. The Court found the evidence to be inadmissible because it was highly unreliable and because defendant had no fair opportunity to rebut it. Similarly, in *United States v. Perez*, 493 F.2d 1339 (10th Cir. 1974), hearsay testimony of a narcotics agent as to what he had been told by an informer as to the informer's relationship with defendants was inadmissible as admission of such testimony violated the defendants' confrontation rights where the informer did not confront them in court. Likewise, in a prosecution for importing and conspiring to import heroin, admission, over objection, of hearsay testimony that the commander in charge of the narcotics section had told the witness that the commander had received information that the accused was one of eight persons selling heroin, was held to be prejudicial error in *United States v. Miranda*, 505 F.2d 697 (9th Cir. 1974). Finally, in *United States v. Johnstown*, 426 F.2d 112 (7th Cir. 1970), the Court held that prejudicial error had been committed when, in a prosecution for the sale and possession of narcotics, an officer was permitted to testify that a deceased informant said he had exchanged stolen goods with the defendant in return for morphine.



In the instant case, the testimony of Officer Gilletti that he informed Sergeant Pruitt that "Mom Santana had the $110", admittedly contained a repetition of the statement made by Patricia McCafferty to the officer subsequent to her arrest (N.T. 2-24 to 2-25), and as such, included inadmissible hearsay statements. That the testimony contained hearsay information is clearly determined by the fact that the statement can rationally be accepted as a basis for an inference that Mrs. Santana was involved in the distribution of narcotics only if the hearsay statement is true. Furthermore, it has been held that hearsay is not admissible to show the good faith of government agents through the introduction of evidence showing that the agent had reasonable cause to believe that a suspect was engaged in criminal activities. See *United States v. McClain, supra* at 435; *United States v. Walton*, 411 F.2d 283 (9th Cir. 1969). Thus, as the statement is not admissible to show the good faith of Officer Pruitt in his arrest of Mrs. Santana or for any other relevant non-hearsay purpose, and as the statement was clearly admitted as evidence of the truth of the matter asserted therein, it is hearsay testimony within the meaning of Federal Rule of Evidence 801. As the statement was admitted by the trial court as other crime evidence relevant to the issue of Mrs. Santana's intent to distribute narcotics, it must be evidence which is *"clear and convincing"* in order to have been properly admitted at her trial. It is evident that the hearsay nature of the testimony, *in itself*, renders the evidence unreliable and speculative as there was no opportunity for petitioner to rebut it. Furthermore, assuming *arguendo* that the statement was true (*i.e.* that "Mom" Santana had the money in question), the inference is reasonable that Mrs. Santana's possession of the money was totally unrelated to her possession of heroin (N.T. 2-14, 2-15). Indeed, the fact that only $70 of the $110 in marked currency was eventually found on petitioner (N.T. 2-15, 2-30, 2-31) supports this inference. In balancing "the

strength of the evidence in proving the issue" of intent "against the danger that the jury will be inflamed by the evidence", *see United States v. Goodwin, supra* at 1150, it is clear that the prejudice to the petitioner as a result of the introduction of the statement outweighs the probative value of the evidence. The mere possibility of prejudice is sufficient by itself to exclude the evidence, particularly since the safeguard of full instructions, which the court stated it would give (N.T. 2-14, 2-16), as to the limited purpose of the evidence, is absent. In *United States v. Lewis,* 423 F.2d 457 (8th Cir. 1970), the United States Court of Appeals held that the trial court did not abuse its discretion in a prosecution for narcotics laws violations by permitting an informer to testify that he had frequently purchased drugs from the defendant where the jury was limited to consider such evidence as bearing on intent and *the jury was instructed that the mere fact that a person may have carried on conduct in the past, is not proof of fact that a person is guilty of crime involving similar conduct in the future* (at 459). In the instant case, where the need for full instructions is especially strong as the other crime evidence is uncertain and of a hearsay nature, the jury was not cautioned to beware of the inflammatory and prejudicial character of the evidence when the court charged the jury regarding the statement (N.T. 3-12).

The admission of McCafferty's extrajudicial accusation via the testimony of Officer Gilletti also violated the Confrontation Clause of the Sixth Amendment as McCafferty did not testify and was not available for cross-examination. See *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968); *Nelson v. O'Neil,* 402 U.S. 622, 91 S.Ct. 1723, 29 L.Ed.2d 222 (1971); *California v. Green,* 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970); *United States v. Sidman,* 470 F.2d 1158 (9th Cir. 1972). Indeed, "the right of cross-examination is included in the right of an accused in a criminal case to



confront the witnesses against him" as secured by the Sixth Amendment. *Pointer v. State of Texas,* 380 U.S. 400, 404, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1964). Thus, in *United States v. Holt,* 483 F.2d 77 (5th Cir. 1973), the Court of Appeals properly held that the Government's use of certain out-of-court admissions of a co-defendant, who did not take the stand, amounted to violation of appellant's Sixth Amendment right to confront the witnesses against him, where the admissions tended to inculpate the appellant. Similarly, in *United States v. Perez, supra,* the admission of extrajudicial statements by an informer who did not confront the defendants in court and who was not subject to cross-examination, or under oath, was held to infringe upon defendant's Sixth Amendment guarantee of confrontation. In the instant case, the statement of Officer Gilletti that "Mom Santana had the $110" was in reality an indirect reproduction of the testimony of Patricia McCafferty. Similarly to *Bruton,* the introduction of the statement "added substantial . . . weight to the Government's case in a form not subject to cross-examination, since [McCafferty] did not take the stand." *Bruton v. United States, supra,* 391 U.S. at 128, 88 S.Ct. at 1623, 20 L.Ed.2d at 480. Thus, the introduction of the statement deprived appellant of his constitutional right to cross-examination as secured by the Confrontation Clause of the Sixth Amendment and as such, the appellant is entitled to a judgment of reversal. See *Gray v. United States,* 407 F.2d 830 (5th Cir. 1969).

Finally, a violation of Federal Rule of Evidence 602 resulted from the admission into evidence of the testimony of Officer Gilletti that he informed Officer Pruitt that "Mom Santana had the $110". Pursuant to Rule 602, a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Accordingly, if testimony of a witness purports to be testimony of observed facts, but the testimony is actually a repetition of the statements

of others, the witness lacks firsthand knowledge (See McCormick On Evidence, at 21 (1972)), and the evidence is inadmissible under Rule 602. Similarly, if a witness's testimony proceeds from speculation or inference rather than from personal knowledge, its admission into evidence would be violative of Rule 602 (unless the witness is an expert; see Federal Rules of Evidence 703, 705). For example, in *United States v. Borelli*, 336 F.2d 376 (2nd Cir. 1964), *cert. denied, Cinquegrano v. United States*, 85 S.Ct. 647, 379 U.S. 960, 13 L.Ed.2d 555 and *Mogavero v. United States*, 85 S.Ct. 647, 379 U.S. 960, 13 L.Ed.2d 555, the court of appeals held that an objection should have been sustained to a statement that the contents of a suitcase "must have been narcotics" in the absence of a showing that the witness was giving " ' an impression derived from the *exercise of his own senses*, not from the reports of others,' or from speculation based on the high price paid." *Id.* at 392.

In the case at hand, as the statement of Officer Gilletti reflected not his personal knowledge but merely the words of Patricia McCafferty (N.T. 2-24 to 2-25) and the speculation engendered in the witness as a result of McCafferty's statement, its admission into evidence was in direct violation of Federal Rule of Evidence 602.

Before a federal constitutional error can be held harmless, a reviewing court must be able to declare a belief that it was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969). "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy v. State of Connecticut*, 375 U.S. 85, 86-87, 84 S.Ct. 229, 230, 11 L.Ed.2d 176 (1963). Furthermore, the original common-law harmless-error rule has been sustained in that constitutional error, in admitting highly prejudicial evidence or comments, casts on someone other than the defendant prejudiced by it the burden to show that it was harmless. *Chapman v. State of California*, 386 U.S. at 23, 24, 87 S.Ct. at 828, 17 L.Ed.2d at 710. In the instant case, the erroneous admission of the statement of Officer Gilletti created a "reasonable possibility that the evidence complained of might have contributed to . . . [petitioner's] conviction". *Id.*



Indeed, the testimony admitted by the court as evidence on the issue of Mrs. Santana's intent with respect to the narcotics discovered in her possession (N.T. 2-14), points to her as the perpetrator of an earlier narcotics offense for which she was not tried. As was recognized in *Goodwin*, the potential inflammatory effect on the jury of such evidence and the danger that the jury's conviction of Mrs. Santana resulted from the admission of the highly prejudicial evidence is so great that the admission into evidence of the statement cannot be said to have been harmless error. Furthermore, the failure of the court's charge to adequately warn the jury of the prejudicial nature of the evidence clearly renders its consideration by the jury fundamental constitutional error. For the above reasons, it is respectfully submitted that the Government's burden of showing the error to be harmless beyond a reasonable doubt cannot be met and that the judgment of sentence of petitioner must be vacated, and a new trial granted.

**II. The District Court Erred in Denying Petitioner's Motion for Mistrial and Overruling Defense Objections to Testimony of a Government Witness, a Police Officer, Which Raised an Inference that Petitioner Had Been Arrested on Numerous Occasions.**

In the course of redirect examination of government witness, police officer Richard Strohm, he was asked whether or not he had seen petitioner prior to her arrest on August 16, 1974 (N.T. 2-62). In response to the government's in-

terrogation, Officer Strohm testified that he had seen petitioner face-to-face on approximately seven occasions prior to August 16th (N.T. 2-62). Objection to the testimony by defense counsel on the ground that the evidence was highly prejudicial in that it irresistably led to the inference that petitioner had been the subject of numerous prior arrests, was overruled by the court (N.T. 2-62 to 2-63).

Unless and until an accused puts his character at issue by adducing evidence of his good character or by taking the stand and raising an issue as to his credibility, the prosecutor is forbidden to introduce evidence of the accused's character in order to prove that he is a person likely to engage in criminal conduct. *United States v. Wright*, 489 F.2d 1131 (D.C. Cir. 1973). *See Michelson v. United States*, 335 U.S. 469, 475-476, 69 S.Ct. 213, 93 L.Ed.2d 168 (1948); *United States v. Fox*, 473 F.2d 131, 134-135 (D.C. Cir. 1972). The rationale behind this common law rule of evidence was articulated in *Michelson*:

> "The inquiry is not rejected because character is irrelevent; on the contrary, it is said to weigh too much with the jury and so to over-persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Michelson v. United States*, 335 U.S. at 475, 476.

Accordingly, it is fundamental evidentiary law that the prosecution may not elicit testimony as to a defendant's prior arrest or indictment for crime not resulting in conviction and that reference to such on the witness stand constitutes prejudicial and reversible error. *United States v. Ortiz*, 507 F.2d 1224 (6th Cir. 1974); *United States v. Pennix*, 313 F.2d 524 (4th Cir. 1963). It is respectfully submitted that prejudice can result from any allusion to a defendant's prior acquaintance with the police where such allusion infers prior criminal activity and is accompanied



by innuendo. Thus, in *United States v. Brown*, 451 F.2d 1231 (5th Cir. 1971), the Court held that prejudicial error had been committed when the Government was permitted to inquire of a government witness whether or not the defendants' names were included in a list of persons known to the sheriff's department as persons involved with narcotics. The failure of defendants to take the witness stand has been a primary factor in several courts' decisions that prejudicial error had occurred when allusions to prior involvement with the police were allowed at trial. In *Barnes v. United States* 365 F.2d 509 (D.C. Cir. 1966), the admission in a larceny trial of a police photograph with tape covering the words at the bottom of the photograph was held to constitute prejudicial error where a substantial probability existed that the fact of defendant's prior involvement with the police was impressed on the jury, *and where the defendant did not take the stand.* Similarly, in *Freeman v. United States*, 322 F.2d 426 (D.C Cir 1963), where defendant did not take the stand in his narcotics prosecution, the admission of testimony that a policeman had previously arrested the defendant for narcotics violations was held to be prejudicial error.

In the instant case, Officer Strohm's testimony that he had seen petitioner face-to-face on numerous occasions prior to the arrest of August 16, 1974, inevitably gives rise to the inference of prior criminal activity and arrests on the part of Mrs. Santana. As was recognized in *Michelson*, this type of testimony "weigh[s] too much with the jury and so . . . overpersuade[s] them as to . . . deny [the defendant] . . . a fair opportunity to defend against a particular charge". *Michelson v. United States*, 335 U.S. at 475, 476. The possibility of prejudice to petitioner as a result of Officer Strohm's testimony, is increased due to the fact that she did not take the stand and testify in her own behalf. Through the testimony of Officer Strohm, the Government successfully put before the jury facts relating to general bad reputation or character. As petitioner had not put her

character or credibility in issue, it is respectfully submitted that in accordance with *Michelson, Barnes, Brown* and *Freeman*, the admission into evidence of Officer Strohm's statements impressed on the jury the fact of prior criminal activity on the part of the petitioner and as such, deprived her of her constitutional right to a fair and impartial trial.

**III. The District Court Erred in Denying a Defense Objection to the Point for Charge on "Intent to Deliver" Where the Court's Charge Failed to Instruct the Jury that in Weighing the Evidence on Petitioner's Drug Use, They Could Consider the Police Failure to Examine the Petitioner Anywhere but on Her Arms.**

In its charge to the jury concerning the evidence with respect to Mrs. Santana's alleged "intent to distribute" the narcotics discovered on her person, the court instructed the jury that it could consider testimony by Officer Strohm that an examination of petitioner's arms revealed no evidence of drug use (N.T. 3-16 to 3-17). However, the court failed to mention to the jury the fact that according to all the testimony, the police officers failed to examine any of the other parts of her body which could also be used for injection of drugs. In effect, the court's charge placed great emphasis on an incriminating inference relating to the charge of intent to distribute while disregarding negative evidence favorable to petitioner with respect to the same issue.

"If justice is to be done in accordance with the rule of law, it is of paramount importance that the court's instructions be clear, accurate, complete and comprehensible, particularly with respect to the essential elements of the alleged crime that must be proved by the government beyond a reasonable doubt." *United States v. Clark*, 475 F.2d 240 (2nd Cir. 1973). Accordingly, in order to present a fair and clear view of all of the evidence to the jury, a trial court may not single out and place undue emphasis upon particular evidence and disregard other evidence upon the



same matter, even though the charge may state a correct principle of law. See *Bird v. United States*, 187 U.S. 118, 23 S.Ct. 42, 47 L.Ed. 100 (1902). Especially in criminal prosecutions, the instructions should refer not only to the evidence favoring the prosecution's case, but also to any favorable evidence comprising defensive matter in behalf of the accused. *Bird v. United States, supra.*

In the instant case, by failing to charge the jury that in weighing the evidence on petitioner's drug use, they could consider the police failure to examine her anywhere but on her arms, the court presented an incomplete and unbalanced portrait of the evidence as to an essential element of the alleged crime charged. Especially in light of the dearth of direct evidence as to petitioner's alleged "intent to distribute", the court's direct reference to the government's evidence (and inferences therefrom) as to her drug use, in the absence of a reference to the defensive matter relating to the same issue, deprived petitioner of her right to a "clear, accurate, complete and comprehensible" charge as to "the essential elements of the alleged crime." It is respectfully submitted that this emphasis upon only the evidence prejudicial to the petitioner so confused the jury and left erroneous impressions in their minds as to deprive petitioner of her constitutional right to a fair trial.

## CONCLUSION

For the foregoing reasons, it is respectfully requested that the petition for a writ of certiorari should be granted.

Gerald A. Stein
NEEDLEMAN, NEEDLEMAN,
TABB & EISMAN, LTD.
*Attorneys for Petitioner*

February 6, 1978

**Relevant Docket Entries**

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

---

| | |
|---|---|
| United States of America<br>*v.*<br>Dominga Santana (Count #2)<br>*Defendant* | Crim. No. 74-502<br>Distribution of and Possession with Intent to Distribute a Narcotic Drug Controlled Substance<br>21 U.S.C. §841 (3 count) |

**1974**

| | |
|---|---|
| Aug. 27 | True bill. |
| Aug. 27 | Bail to be entered in the sum of $5,000.00 [10% Cash] as to deft Santana. |
| Sept. 19 | PLEA: NOT GUILTY to Count #2, as to deft Santana; deft allowed 30 days to file motions. |
| Oct. 18 | Deft Santana's motion for relief from illegal search and seizure, with memorandum of law in support thereof, filed. |
| Oct. 25 | Govt's motion to dismiss deft Santana's motion for relief from illegal search and seizure, filed. |
| Oct. 30 | Deft Santana's reply to Govt's motion to dismiss deft's motion for relief from illegal search and seizure, filed. |
| Oct. 31 | ORDER [dated 10-30-74] that the motion of deft Santana for relief from illegal search and seizure is DENIED for the reason that it has not been filed in accordance with the provisions of Local Rule 11; leave is granted to file in accordance therewith, filed.<br>11-1-74 Entered & copies mailed. |
| Nov. 11 | Govt's answer to deft Santana's motion for relief from illegal search and seizure, with memorandum in support thereof, filed. |

**1974**

Nov. 12 Deft Santana's re-filed motion for relief from illegal search and seizure, with memorandum of law in support thereof, filed.

Nov. 12 HEARING SUR motion of deft Alejandro re: suppression of evidence and sur motion of deft Santana re: relief from illegal search and seizure; witnesses sworn; adjourned until 11-13-74.

Dec. 10 Govt's notice of appeal, filed.

Dec. 10 Copy of Clerk's notice of appeal, filed.

Dec. 18 Record transmitted to U.S.C.A.

**1975**

May 16 Certified copy from USCA affirming judgment of this Court, filed.

Nov. 13 Original record and certified copy of docket entries transmitted to U.S. Supreme Court.

Nov. 19 Original record and certified copy of docket entries received by U.S. Supreme Court on 11-14-75, filed.

**1976**

July 26 Judgment of the Supreme Court certified that upon consideration of the case of Dominga Santana and William Alejandro on consideration whereof, it is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals in this cause be, and the same is hereby, reversed to the United States Court of Appeals for the Third Circuit for further proceedings in conformity with the opinion of the Court, filed.

Sept. 14 Cert. copy of Judgment Order of U.S. Court of Appeals issued in lieu of a formal mandate reversing judgment of district court and proceedings remanded to district court for further proceedings in conformity with opinion of the U.S. Supreme Court, filed.

**1977**

Feb. 9 Minute Sheet re: CASE CALLED FOR TRIAL—D. Santana, defendant is in the hospital, filed.

Apr. 27 Minute Sheet dated 4-25-77 re: CASE CALLED FOR TRIAL deft. Santana present—warrant still outstanding on Alejandro—case to commence on 4-26-77, filed.



**1977**

Apr. 27 Minute Sheet dated 4-26-77 re: JURY TRIAL—jurors called and sworn—defendant Alejandro is severed as he is Santana a fugitive—interpreter sworn, filed.

Apr. 29 Minute Sheet dated 4-27-77 re: trial resumes—motion of defendant for mistrial DENIED—(Santana), filed.

Apr. 29 Minute Sheet dated 4-28-77—trial resumes—Deft.'s motion for judgment of acquittal—DENIED (Santana)—VERDICT—Ct. 2 guilty. Government's motion to increase bail—bail increased to $10,000.00 good bail, filed.

May 3 Motion of deft. Santana for new trial and/or judgment of acquittal, filed.

May 17 Government's answer to defendant's motion for new trial and/or judgment of acquittal, filed. (D. Santana)

May 23 Additional reasons in support of defendant's motion for new trial and/or judgment of acquittal, filed.

May 23 Memorandum in support of motion for new trial and or judgment of acquittal, filed.

June 6 Government's memorandum of law in support of its answer to defendant Santana's motion for a new trial and/or judgment of acquittal, filed.

June 13 Order that deft.'s (Dominga Santana) motion for new trial and/or judgment of acquittal is DENIED—sent. is set for 6-20-77, filed. 6-14-77 entered and copies mailed.

June 15 Letter to Judge Bechtle dated 6-10-77 from Thomas J. McBride, U.S.A. re: Dominga Santana—re: Post-trial motions on the Memorandum of law without oral argument, filed.

June 20 Minute Sheet re: SENTENCING—Ct. 2—Impr. 3 yrs. to commence on 6-27-77 pursuant to 18/4205(b)(2) to be followed by 3 yrs. special parole, filed. (D. Santana)

June 21 Judgment and Commitment Order, filed. 6-22-77 entered.

June 24 Defendant's Notice of Appeal, filed. Dominga Santana filed on 6-24-77 at 3:05P.M. copy to: Defendant, United States Attorney on 6-27-77.

June 28 Record transmitted to Clerk, U.S. Court of Appeals.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

---

No. 77-1904

---

United States of America

*v.*

Patricia McCafferty, Dominga Santana and
William Alejandro
Dominga Santana, *Appellant*

---

On Appeal from the United States District Court for the Eastern District of Pennsylvania, Crim. No. 74-502.

---

Submitted Under Third Circuit Rule 12(6)
January 3, 1978
Before: ADAMS, GIBBONS and GARTH, *Circuit Judges.*

---

**JUDGMENT ORDER**

---

After consideration of all the contentions raised by the appellant, namely, that (1) the district court erred in denying a defense motion for a mistrial and overruling defense objections where a government witness testified



to an alleged narcotics transaction of which he had no personal knowledge and with which the appellant was not charged; (2) the lower court erred in denying appellant's motion for mistrial and in overruling defense objections to testimony of a government witness, a police officer, which raised an inference that appellant had been arrested on numerous occasions; and (3) the lower court erred in denying a defense objection to the point for charge on "intent to deliver" where the court's charge failed to instruct the jury that in weighing the evidence regarding appellant's drug use, they could consider the police failure to examine the appellant anywhere but on her arms, it is

ADJUDGED AND ORDERED, that the judgment of the district court be and it is hereby affirmed.

BY THE COURT

ARLIN M. ADAMS
Circuit Judge

Attest:

/s/
Thomas F. Quinn, Clerk

Dated: Jan 6, 1978

Supreme Court, U. S.
FILED
APR 17 1978
MICHAEL RODAK, JR., CLERK

No. 77-1155

# In the Supreme Court of the United States

OCTOBER TERM, 1977

---

DOMINGA SANTANA, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

WADE H. MCCREE, JR.,
*Solicitor General,*

BENJAMIN R. CIVILETTI,
*Assistant Attorney General,*

SIDNEY M. GLAZER,
JOHN C. WINKFIELD,
*Attorneys,*
*Department of Justice,*
*Washington, D.C. 20530.*

# In the Supreme Court of the United States

OCTOBER TERM, 1977

---

No. 77-1155

DOMINGA SANTANA, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINION BELOW

The court of appeals affirmed without opinion (Pet. App. A-4 to A-5).

### JURISDICTION

The judgment of the court of appeals was entered on January 6, 1978. The petition for a writ of certiorari was filed on February 6, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether a police officer's testimony that he told another officer that petitioner had marked money, or an officer's testimony that he had seen petitioner on seven prior occasions, was erroneously admitted in evidence.

## STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of possession of heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1).[1] She was sentenced to three years' imprisonment, to be followed by a three-year special parole term. The court of appeals affirmed (Pet. App. A-4 to A-5).

The government's evidence showed that on August 16, 1974, officer Michael Gilletti of the narcotics unit of the Philadelphia Police Department arranged to purchase heroin from Patricia McCafferty (Tr. 2-16). Gilletti recorded the serial numbers of $110 in marked bills and drove to meet McCafferty (Tr. 2-17). She directed him to North Philadelphia, where she took the marked money and entered a house at

[1] Petitioner's co-defendants Patricia McCafferty and William Alejandro pleaded guilty.

Petitioner's pre-trial motion to suppress heroin and marked money seized during and after her arrest on August 16, 1974, was granted by the district court. The government appealed from that ruling, and the court of appeals affirmed. On June 24, 1976, this Court reversed. *United States* v. *Santana*, 427 U.S. 38. The present trial followed in April 1977.



2311 North Fifth Street (Tr. 2-19). Approximately five minutes later, she returned to the car and gave Gilletti several packets of powder (Tr. 2-21). Gilletti then drove about a block and a half and pulled over to the side of the road, where Sergeant Pruitt and other police officers met him. Gilletti then identified himself to McCafferty as a police officer and placed her under arrest (*ibid.*). Gilletti also told Sgt. Pruitt, on the basis of information volunteered by McCafferty, that the $110 in marked bills that he had given McCafferty was now in petitioner's possession (Tr. 2-22, 2-25).

Sgt. Pruitt and other officers immediately returned to 2311 North Fifth Street, where they saw petitioner standing in the doorway (Tr. 2-28). They identified themselves as police officers and ran to the front door. Petitioner turned to retreat into the house. When the officers caught her in her vestibule, she dropped a brown paper bag, out of which fell two bundles of glazed paper packets containing a white powder (Tr. 2-29 to 2-30). The bag also contained 13 additional bundles of glazed paper packets. Meanwhile, co-defendant William Alejandro grabbed the two bundles of heroin that petitioner had dropped and tried to escape from the house, but he was subdued (Tr. 2-30). Petitioner was arrested and told to empty her pockets. She produced $70 of the recorded and marked money from her pockets (Tr. 2-30 to 2-31). The seized bags contained heroin (Tr. 2-49).

## ARGUMENT

1. Petitioner objects (Pet. 7-15) to Officer Gilletti's testimony (Tr. 2-21 to 2-23) that "I * * * told Sergeant Pruitt that Mom Santana [*i.e.*, petitioner] had the $110" and "I told Sergeant Pruitt that Mom Santana had the money that was used for that buy." She appears to contend that Gilletti's statement was based on McCafferty's out-of-court statement that petitioner had the money, and that therefore Gilletti's statement itself must be hearsay.[2]

Petitioner fails, however, to recognize that, in order for testimony to be hearsay, it must recount an out-of-court statement "offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). Here, Gilletti's account of his earlier statement to Sergeant Pruitt was offered only to provide background information about the events leading up to the arrest, so that Pruitt's subsequent actions in going to petitioner's house would be understandable to the jury (see Tr. 2-12). Since Gilletti's earlier out-of-court statement was recounted only to show that it was made, the testimony was not hearsay. See, *e.g.*, *United States* v. *Zamarripa*, 544 F.2d 978, 982 (C.A. 8); *Nash* v. *United States*, 405 F.2d 1047, 1052-1053 (C.A. 8).

[2] Petitioner's counsel, on cross-examination, elicited from Gilletti that McCafferty had told him that petitioner had the money (Tr. 2-24 to 2-25). To the extent that her own counsel's questioning brought hearsay into the case, petitioner has no basis for complaint.



Petitioner also complains that this testimony was received in violation of Fed. R. Evid. 602, which limits a witness's testimony to matters of which the witness has personal knowledge (Pet. 13-14), and that the court abused its discretion in admitting the testimony, under Rule 404(b), as evidence of other crimes (Pet. 8-12).[3]

At the outset, we note that petitioner's counsel did not raise either of these grounds in objecting to Gilletti's testimony (see Tr. 2-22). In addition, as to petitioner's Rule 602 claim, she fails to recognize that Gilletti was not testifying as to the truth of his earlier assertion that petitioner had the money, but only to the fact that he had made the statement to Pruitt. Gilletti clearly had personal knowledge as to whether he did or did not make the statement, and Rule 602 accordingly was satisfied.

Similarly, the challenged statement did not run afoul of Rule 404(b), because it was not admitted "to prove the character of [petitioner] in order to show

[3] Fed. R. Evid. 602 provides in relevant part:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. * * *

Fed. R. Evid. 404(b) provides:

> **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

that [she] acted in conformity therewith," but rather was admitted for a permissible "other purpose[ ]"—that is, to describe the events leading up to petitioner's arrest. See *Nash* v. *United States*, *supra*, 405 F.2d at 1052; *United States* v. *Volkell*, 251 F.2d 333, 336 (C.A. 2).

If petitioner had wished to limit the jury's use of Gilletti's testimony, moreover, she should have asked for an appropriate limiting instruction. Fed. R. Evid. 105. In the absence of such a request (see Tr. 2-89, 3-2), petitioner cannot now complain on the basis of speculation that the jury may have used Gilletti's testimony as evidence that petitioner obtained money from McCafferty. In any event, counsel's failure to request such an instruction could not have had any significant effect on the outcome of the case. The government's evidence showed that McCafferty was given marked money with which to buy heroin and that the marked money was found minutes later on petitioner's person. Any inference that the jury could have drawn from Gilletti's testimony would have been simply cumulative and was not crucial to the case.

2. Officer Strohm, one of the arresting officers, testified that petitioner started running after he "hollered 'Police' " (Tr. 2-48), and on redirect examination Strohm stated that he had seen petitioner on at least seven prior occasions (Tr. 2-62). Petitioner contends (Pet. 15-18) that this latter testimony was introduced to attack petitioner's good character and credibility and that this was impermissible because petitioner had not placed these in issue.



As the district court pointed out, however, petitioner's counsel raised the suggestion during cross-examination that petitioner ran because of fright. The challenged testimony was allowable to raise the alternative possibility that petitioner ran because she knew Officer Strohm to be a police officer (Tr. 2-63). The testimony, in short, was relevant to showing flight that could be evidence of guilt, and was admissible for this purpose. See Fed. R. Evid. 404(b).[4]

---

[4] The court in its instructions charged that, in determining whether petitioner possessed heroin with the intent to distribute it, the jury could consider testimony that she did not appear to have any evidence of drug use on her arms (Tr. 3-16 to 3-17, 3-30). Petitioner contends (Pet. 18-19) that this charge placed undue emphasis upon particular evidence unfavorable to her.

This instruction was not improper. The court emphasized that such evidence was not conclusive, but merely a factor that could be considered by the jury. Petitioner's counsel was free to argue to the jury that this evidence was of limited probative value unless there was also testimony that no marks were found elsewhere on her body. It was unnecessary for the court to make this point as well.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
*Solicitor General.*

BENJAMIN R. CIVILETTI,
*Assistant Attorney General.*

SIDNEY M. GLAZER,
JOHN C. WINKFIELD,
*Attorneys.*

APRIL 1978.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 259585 116